90-650

NO.

In The Supreme Court of the United States

OCTOBER TERM, 1990

DR. EZZAT MAJD POUR,

Petitioner

VERSUS

MISSISSIPPI MEDICAL LICENSURE BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Whether suspension of a medical doctor's license is such a serious loss that due process requires a clear and convincing evidence standard of proof.

2. Whether due process prohibits a state's suspending a medical license because of a finding of mental disease, without evidence that the mental disease affected the ability to practice medicine safely.

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IN THE

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OPINION BELOW

The unreported opinion of the United States Court of Appeals for the Fifth Circuit is attached as an appendix.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on July 24, 1990. This Court has jurisdiction to review by Writ of Certiorari under 28 USC Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution Amendment Fourteen, which says:

> "[N]or...hall any state provide any person of life, liberty or property, without due process of law..."

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit permitted the State of Mississippi to suspend the medical license of Dr. Majd Pour because of the finding of the Mississippi Medical Licensure Board that Majd suffers from paranoia, even though there was no finding or evidence that this paranoia affeted his ability to treat patients safely. The Court of Appeals also permitted the suspension of license, even though theBoard has never adopted a "clear and convincing" standard of proof. These two holdings are the basis of the present Petition.

The Mississippi Medical Licensure Board, which contains no psychiatrists, found that the Petitioner, Dr. Ezzat Majd Pour, suffers from a "major thought disorder-paranoid state" and suspended his license for three (3) years. The suspension order specified that the suspension would be lifted if Majd would submit to:

> "...comprehensive psychiatric and psychological examinations by a psychiatrist approved by the Board...."

T., pp. 31.

The order of suspension was based upon testimony before the Board from a psychiatrist, Dr. Galvez, that Majd suffers from paranoia. In adopting this finding, the Board rejected abundant psychiatric and psychological testimony that Majd suffers from no thought disorder, choosing to credit the testimony of Dr. Galvez because it thought that his examination more thorough and because Galvez had been made aware of

claims by nursing personnel and other doctors of bizarre behavior by Majd.[1]

While Petitioner concedes that there was evidence before the Board of paranoia (in the form of the testimony by Galvez), there was no evidence that this paranoia had any effect on Dr. Majd's ability to practice medicine safely. The uncontradicted testimony at the Board hearing was that there is no relationship between paranoia and the ability to afford patients safe medical care. Indeed, Galvez, the psychiatrist who provided the only medical evidence of paranoia, testified:

> "I saw it (paranoia) among physicians...Some of them stay on a very paranoid level. Some of them stay paranoid, and they function quite well. They lock up doors and keep tapes on the doors and paper to know when somebody comes to open it. But they practice good medicine...."

Galvez testimony; Suspension Hearing Transcript (hereinafter referred to as SHT), pp. 293-294.

Dr. Galvez's testimony on the issue of whether paranoia affected the ability to safely care for patients was consistent with the testimony of Plaintiff's witness, Dr. William Kallman, who testified:

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[1]No attempt will be made in this Petition to recite the highly disputed evidence concerning Majd's behavior. Suffice it to say, that doctors and nurses at the Tunica Hospital claimed that Majd made bizarre and unfounded accusations against them of malpractice. On the other hand, numerous black patients testified for Majd that Majd was the only doctor in Tunica, Mississippi who would provide blacks proper treatment, and that Majd's complaints about malpractice and gross negligence at the hospital directed toward black patients were true.

"Q. ...[A]ssuming that he is...delusional,...and does have a paranoid disorder, what does that tell you, if anything, about his ability to practice medicine?

A. The paranoid disorder...never or rarely ever causes a disruption in occupational functioning. It is more likely to cause disruption in marital functions...

Q. ...[L]et us assume that the Board accepts as true Dr. Galvez's testimony that this man is not schizophrenic, and further assumes that he is delusional and has a paranoid disorder, does that...provide any evidence that this man is unable to treat patients safely?

A. No, but it could be a separate issue. Disruption in an occupational function with a paranoid disorder is so rare that you would have to make that determination separately...."

SHT, pp. 460-461.

Dr. Kallman identified "Diagnostic and Statistical Manual of Mental Disorders", published by the American Psychiatric Association as the authoritative manual on mental disease. This document was received into evidence at the Board Transcript hearing as Exhibit "8" and corroborates all the testimony at the hearing that there is no known relationship between paranoia and the ability to carry on a profession. Specifically, in describing "impairment" caused paranoid disorders, the manual says on page 195:

"Impairment–Impairment in daily functioning is rare. Intellectual and occupational functioning are usually preserved, even where the disorder is chronic. Social and marital functioning, on the other hand, are often severely impaired."

Petitioner's Exhibit "8" at trial, T., pp. 195.[2]

Apparently finding it unimportant that the disease of paranoia has no effect on the ability to treat patients safely, the Mississippi Medical Licensure Board adopted the finding of the psychiatrist (Galvez) that Majd suffers from a "major thought disorder–paranoia", and entered its order that his license be suspended for three (3) years, with the suspension to be lifted if Majd submitted to "comprehensive psychiatric and psychological examinations by a psychiatrist approved by the Board". T., pp. 31.

After specifying that the suspension would be lifted if Majd were treated by a psychiatrist approved by the Board, the Board never provided the names of any psychiatrists who were "approved", and Majd, therefore, attempted to comply with the Board's order by submitting to examinations by

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[2]The fact that Dr. Majd's ability to safely treat patients was unaffected by his alleged paranoia, was a recurrent theme throughout the Board hearing. See, for example, testimony of Dr. Howard, SHT, pp. 62 (Never any claim that Majd had done anything that harmed any patient at the hospital.); Testimony of Whittle, SHT, pp. 188, 191-192, 198 (Majd saw 50 to 60 patients a day, worked 24 hours a day, and was "very compassionate toward his patients".); Testimony of Dr. George Hamilton, SHT, pp. 256 (One can be suffering from paranoia and still be "practicing adequate, good medicine".); Testimony of Linda Butler, SHT, pp. 342, 347-349 (Majd worked 8:00 a.m. until midnight every night of the week, affording treatment to patients, always knowing patients' children on a first name basis.); Testimony of Linda Sowers, SHT, pp. 372-376 (Describing Majd's reputation in Tunica community for practicing good medicine and describing dependency of people of community for using him as a doctor.); Dr. Majd, ever since his license was revoked in Mississippi, has practiced in Alabama in two different hospitals, working 300 to 400 hours per month. SHT, pp. 553-555. This, of course, is overwhelming proof that Majd's alleged paranoia did not prevent him from practicing good medicine, nor did it endanger patients.

psychiatrists of his own choosing. Specifically, after the Board's ruling, Majd had psychiatric examinations by Dr. David Moore, Dr. James Mosley, Dr. Antonie Jean-Pierre, Dr. Don Malinky and Dr. Judith Carroll. These were all psychiatrists licensed either in Mississippi or Tennessee. T., pp. 34. Armed with these psychiatric and psychological examinations, all of which found Majd suffered from no mental disease, Majd, on May 13, 1987, petitioned the Board to reinstate his license. T., pp. 31, Exhibit "6". The Board declined to reinstate Majd, finding that the psychiatrists who had examined him had not been "specifically approved by the Board." T., pp. 41, Exhibit "9".

In March, 1989, Majd filed a second petition for reinstatement. This second petition contained an additional psychiatric report by a psychiatrist who had been specifically approved by the Board, Dr. Maggio. Dr. Maggio also found that Majd suffered no mental disease. T., pp. 44-48. The Board never acted on the second petition for reinstatement.

Dr. Majd, having been unsuccessful in convincing the Board that he did not suffer from a mental disease, filed suit in the United States District Court on July 23, 1987. Majd's complaint, as amended, made the following claims:

> "Revoking a medical license based upon psychiatric opinion, when the vast majority of examining psychiatrists disagree with the opinion, and when the ultimate decision as to which psychiatric opinion is to be accepted is made by non-psychiatrists, represents such irrational governmental action as to offend due process...

> There was no evidence at all that Majd's ability to care for patients was jeopardized because of any alleged mental illness. Revoking a medical license without having any evidence that the alleged mental illness affects the ability to care for patients violates due process of law...
>
> The Defendant Board never adopted any regulation requiring 'clear and convincing evidence' as required by due process, to revoke a license...."

R., Vol. 2, pp. 406-407.

By consent, the case was assigned to United States Magistrate Countiss for trial., R., Vol. 2, pp. 524-526.

Apparently concerned that Galvez's examination conflicted with the findings of all other psychiatrists and psychologists, Magistrate Countiss appointed a psychiatrist (Dr. Blizzard), of his own choosing, to examine Majd. R., Vol. 2, pp. 538-540. Dr. Blizzard, who reported:

> "My own evaluation of Dr. Majd did not substantiate a diagnosis of schizoid personality, much less a schizophrenic illness...This psychiatric evaluation would be incomplete and invalid if it did not take note of the large measure of ego strength and mental health necessary for a person to seek out and to find responsible medical positions and to function adequately therein in the face of three to four years of persistent questioning of his 'sanity'. I found Dr. Majd without diagnosable mental illness or disorder and in good mental and emotional health."

R., Vol. 2, pp. 553.

On October 22, 1987, the Magistrate dismissed Majd's claim. holding that the requirement of due process that there

be "some evidence" in support of the Board's decision had been met, and that the failure to apply a "clear and convincing evidence" standard was of no importance, since Majd had not appealed to the state courts. The United States Court of Appeals for the Fifth Circuit affirmed, holding that the clear and convincing evidence standard does not apply to revocation of a medical license, and that due process was not violated since there was "some evidence" to support the Board's decision.

ARGUMENT I.

THE WRIT SHOULD BE GRANTED IN ORDER TO CAUSE THE LOWER COURTS TO COMPLY WITH THIS COURT'S REPEATED DIRECTIVES THAT THOSE CASES INVOLVING AN INTEREST OF PARAMOUNT IMPORTANCE – SUCH AS A MEDICAL LICENSE–MUST BE ADJUDICATED UNDER A "CLEAR AND CONVINCING" STANDARD OF PROOF.

The Executive Director of the Mississippi Medical Licensure Board, Dr. Frank Morgan, testified that the Board had never adopted a "clear and convincing evidence" standard of proof. There was no evidence that a single Board member knew of such a standard, or utilized it in deciding to suspend Dr. Majd's license. T., pp. 52-54.

This is the very type case where a clear and convincing evidence standard would make a difference in the outcome of this case. The case was one of directly conflicting evidence. On the one hand, the Board appointed psychiatrist, Dr. Galvez, testified that Dr. Majd suffers from a major thought disorder and described this as being a "paranoid state". Galvez's opinion

was bolstered by the testimony of lay persons of bizarre statements by Dr. Majd.[3]

On the other hand, counting reports submitted following the hearing, Dr. Majd produced the reports of no less than thirteen (13) psychiatrists and psychologists who found that Majd had no diagnosable mental disease. R., Vol. 1, pp. 47-60. The opinion of these psychiatrists and psychologists was corroborated by the numerous lay witnesses whom Dr. Majd called at the hearing who swore that Majd provided the only suitable medical care to black persons in Tunica, and agreed with Majd that black patients at the Tunica hospital were mistreated and tortured.[4]

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[3]The strongest evidence in this regard was the testimony of nurse, Billie Russell. Russell testified that after Majd had not been allowed to see a patient of his who had died at the hospital, Dr. Majd had claimed that Dr. Orr (the emergency room physician) tried to steal his patients and that Dr. Orr was a part of a group of doctors who were "criminals" and "probably killed hundreds of patients". SHT, pp. 22-30. A recurrent theme in the lay witness testimony was, also, that Majd made unjustified complaints of racism by claiming that nursing personnel and doctors were "the chief of the Klan" and were "personally responsible for killing hundreds of people." SHT, pp. 32.

[4]For example, Leslie Sowers, a black "activist" in Tunica County, Mississippi, testified that nurses at the hospital threatened to kill her son while he was a patient at the hospital. SHT, pp. 354-355. She further testified that she worked part-time for Majd, and that his beliefs that his life was being threatened was not the result of paranoia, but were real, since she had, herself, heard threats of death being made against Majd. SHT, pp. 357.

Given this disagreement among both psychiatrists and lay witnesses, the case is, self-evidently, one where the standard of proof could make a difference. The Board, applying only a "preponderance of the evidence" standard, might well think that it was entitled to accept the testimony of Psychiatrist Galvez on the theory that his opinion was adequately corroborated by lay witnesses' testimony concerning paranoid behavior.

On the other hand, application of a "clear and convincing" evidence standard might have saved Majd's license. After all, there were no less than thirteen (13) psychiatrists and psychologists who swore that Majd had no diagnosable mental disease. These psychiatrists and psychologists were corroborated by a psychiatrist specifically appointed by the Court, Dr. Blizzard, and by the fact that Dr. Majd had been practicing medicine in Alabama, since the time of his suspension until the time of the District Court hearing, without harm to any patient. Under such facts, no unbiased fact-finder would find that there was "clear and convincing evidence" that a mental disease.

The issue thus squarely presented is whether the United States Court of Appeals for the Fifth Circuit acted consistently with this Court's precedents in determining that the Board was not required to apply a "clear and convincing" evidence standard.

Santowsky v. Kramer, 455 U. S. 745, 71 L. Ed. 2d 599, 102 S. Ct. 1388, in the process of holding that the due process clause of the Fourteenth Amendment required that custody

rights be terminated only upon proof by "clear and convincing evidence is required as follows:

> "This Court has mandated an intermediate standard of proof – clear and convincing evidence – when the individual interest at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.' *Addington v. Texas*, 441 U. S. at 424, 60 L. Ed. 2d at 323, 93 S. Ct. 1804. Notwithstanding the state's civil labels and good intentions,...the Court has deemed the level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual with 'a significant deprivation of liberty' or 'stigma', 441 U. S. 425, 426, 60 L. Ed. 2d 323, 99 S. Ct. 1804. See, e.g. *Addington v. Texas, supra*, (civil commitment); *Woodby v. INS*, 483 (deportation); *Chaunt v. United States*, 364 U. S. 350, 353, 5L. Ed. 2d 120, 81 S. Ct. 147 (1960) (denaturalization); *Schneiderman v. United States*, 320 U. S. 118, 125, 159, 87 L. Ed. 1796, 63 S. Ct. 1333 (1943) (denaturalization)."

71 L. Ed. 2d at 608-609.

The Fifth Circuit declined to apply this Court's precedents requiring "clear and convincing evidence" in cases of grievous loss involving a "stigma" amounting to more than "monetary loss", on the theory that this Court has never specifically held that loss of a professional license calls for the application of the "clear and convincing" standard of proof. This holding begs the question since this Court has never addressed the question. The salient point is that this Court, has held that the clear and convincing evidence test is to be applied in cases where the proceedings is of "particular importance", is "more substantial than mere loss of money", and involves the imposition of a

"stigma". Dr. Majd's loss of medical license is more than a "mere loss of money". It deprives him of substantial opportunity to earn a livelihood. It imposes a "stigma" just as surely does the loss of parental rights, or being civilly committed. It represents an official badge that he is "mentally ill"; indeed, so "mentally ill" that he cannot practice a profession for which he has spent many years preparing. How can a loss not be of "particular importance" when it amounts to a determination that one cannot pursue the livelihood for which he has prepared himself during the young adult years of his life? Is there a soul so callous as to claim that being branded a "paranoid" is not an imposition of a "stigma"?

The Fifth Circuit's simple pronouncement that loss of a medical license is not sufficiently important to be protected by a "clear and convincing" evidence standard, ignores the fact that the importance of this "property" interest must be determined by viewing state law. As explained in *Board of Regents v. Roth*, 408 U. S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701:

> "Property interests, of course, are not created by the Constitution. Rather, they are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..." (Emphasis added).

33 L. Ed. 2d at 561.

Rather than applying its own value system to find that a medical license is not sufficiently important to justify a "clear and convincing" evidence standard, the Fifth Circuit should have looked to state law to determine the importance of the

interest. Mississippi law is clear that a license to engage in a learned profession is sufficiently important that a clear and convincing evidence standard should be applied. *See, Hogan v. Mississippi Board of Nursing*, 457 So. 2d 931, 934 (Miss. 1984) (Nursing license protected by clear and convincing evidence standard); and *see Levi v. Mississippi State Bar*, 436 So. 2d 781, 783 (Miss. 1983) (License to practice law protected by clear and convincing standard.)

Since Mississippi courts, as a matter of state law, consider the license to be sufficiently important to be protected by a "clear and convincing evidence" standard, it is baffling as to how the Court of Appeals could have pronounced that the interest is so inconsequential that it is not protected by a clear and convincing evidence standard as a matter of federal due process. Indeed, the fact that Plaintiff, under *Hogan* and *Levi*, would have prevailed had the suit been filed under a "state law" theory, is sufficient in itself to grant certiorari and reverse the holding of the Fifth Circuit. *Santowsky v. Kramer,* made it clear that, in determining the standard to be applied, the Courts should weigh the private interest involved against the competing state interest. By determining in *Levi* and *Hogan* that the state interest was insufficient to justify a "mere preponderance of the evidence standard", the Mississippi Supreme Court has blessed this Court with the decisive evidence that there is no "state interest" sufficient to overcome the medical doctor's interest in being free from the stigma of having his medical license revoked on grounds of mental illness. Thus,

while a violation of state law is itself not proof of a violation of federal due process, *Stern v. Tarrant County Hosp.*, 778 F. 2d 1052 (5th Cir. 1985), the fact that the Mississippi Supreme Court has decisively determined that the state has no interest in the matter, sufficient to justify a "preponderance of the evidence" standard, is surely decisive in holding that this lack of sufficient state interest compels a finding that federal due process was violated by the Board, when it failed to apply a "clear and convincing evidence" standard.

ARGUMENT II.

THE WRIT SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT ACTED INCONSISTENTLY WITH THIS COURT'S PRECEDENTS BY HOLDING THAT DUE PROCESS REQUIRES SOME "EVIDENCE" AS A CONDITION TO DEPRIVING A PERSON OF LIBERTY OR PROPERTY.

This Court has spoken infrequently of the right of an individual to be free from a deprivation of "liberty" or "property", except where the state produces some "evidence" to justify the deprivation. *See, Thompson v. City of Louisville*, 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960) (Where the only evidence of "disorderly conduct" was that the Defendant was very "argumentative", there was no substantial evidence of "disorderly conduct", and the due process clause voided the conviction); *Garner v. Louisiana*, 368 U. S. 157, 7 L. Ed. 2d 207, 82 S. Ct. 248 (1961) (There was no substantial evidence of "disturbing the peace" where the records showed only that the Defendants participated in a peaceful and orderly sit-in demonstration,

and the due process clause voided their convictions for "disturbing the peace".); *Adderly v. Florida*, 385 U. S. 39, 17 L. Ed. 2d 149, 87 S. Ct. 242 (1966) (There was no denial of due process for conviction of "trespass" of protesters who refused to leave public premises after being asked to do so, since there was some "evidence" to support the convictions.); *Superintendent v. Hill*, 472 U. S. 445, 86 L. Ed. 2d 356, 105 S. Ct. 2768 (1985) (There was no due process violation in revoking prisoners' good time credits for committed assault, where there was some evidence in the record that assault had been committed.)

The Fifth Circuit considered these decisions, but was convinced that they were inapplicable, because there was, at least, some evidence that Dr Majd suffered from paranoia. This holding ignored the crucial fact that the relevant question was whether there was evidence that the paranoia affected the ability to treat patients safely. The Board had no authority to suspend the license unless the paranoia affected the ability to treat patients safely. *Miss. Code Ann.*, Section 75-25-53 (1972), permitted the Board to suspend the license only if there was evidence that the physician was unable:

> "...to practice medicine with reasonable skill or safety to patients (by reason of)...mental illness."

Assuming that there was evidence from which the Board might conclude that Majd suffered from a mental disease (paranoia) as of August, 1986,[5] the Board produced no

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[5]The only evidence of a mental disorder was the testimony of Dr. Galvez, the Board's psychiatrist. Dr. Galvez's opinion was contrary to that of 13 psychiatrists and psychologists, who had examined Majd. There was no evidence as to how long the disease of paranoia was expected to last.

evidence that such a mental illness cause Majd to have an inability:

> "...to practice medicine with reasonable skill or safety to patients..."

Miss. Code Ann., Section 75-25-53 (1972).

Dr. Galvez admitted that he knew no relationship between the "paranoid state", which he found Majd to suffer, and the ability to "practice medicine with reasonable skill or safety to patients". Specifically, Dr. Galvez testified:

> "But I saw it (paranoia) among physicians...Some of them stay on a very paranoid level. Some of them stay paranoid, and they function quite well. They lock up doors and keep tapes on the doors and paper to know when somebody comes to open it. But they practice good medicine...."

Galvez testimony, SHT, pp. 293-294.[6]

There being no evidence whatever of a relationship between paranoia and the ability to treat patients safely, the

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[6]The Magistrate claimed there was some "evidence" to support the Board's decision because, on page 289-290, Dr. Galvez was read the decision of the Examining Committee that Dr. Majd's "continued practice of medicine constitutes an imminent danger to public health and safety", and asked whether he agreed with that. The Magistrate found that when Galvez answered,"Yes, I do", this constituted "evidence" that Dr. Majd's paranoia did affect his ability to care for patients. This is not correct. First, this can hardly be considered as evidence supporting the Board's decision, since it is given in response to a leading question, and leading questions do not produce admissible evidence. Second, the question is not phrased in terms of the statute's requirement that it be shown that there be an endangerment to patients. Third, the answer itself, contradicts Galvez's response to the non-leading questions he was asked that there is no relationship between paranoia and ability to practice medicine.

testimony of Dr. William Kallman on this issue was uncontradicted. Dr. Kallman testified:

> "Q. Assuming...that he is delusional, and does have a paranoid disorder...what does that tell you, if anything, about his ability to practice medicine?
>
> A. The paranoid...disorder...it never or rarely ever causes a disruption in occupational functioning. It is more likely to cause a disruption in marital functions....
>
> Q. Let us assume the Board accepts as true Dr. Galvez's testimony that this man is not schizophrenic, and further assume that he is delusional, and has paranoid tendencies, does that provide any evidence that this man is unable to treat patients safely?
>
> A. No. But it could be a separate issue. Disruption in an occupational function with paranoid disorders is so rare that you would have to make that determination separately...."

SHT, pp. 460-461.

Dr. Kallman's testimony was corroborated by the "Diagnostical and Statistical Manual of Disorders", published by the American Psychiatric Association, and which also contains the definitive statement that there is no known relationship between paranoia and occupational functioning. A member of the Board who testified at the hearing before the Magistrate, Dr. Wally, confirmed that, according to the American Psychiatric Association, there is no known relationship between paranoia and the ability to practice a profession. T. , pp. 115-157.

By upholding the suspension of the license, despite the fact that there was no evidence that the ability to practice,

medicine safely was related to the disease of paranoia, the Fifth Circuit misapplied this Court's precedents.[7] Properly applied, this Court's precedents surely meant that there must be some relevant evidence on each material element of the state's case. to hold that the state complied with its burden of producing some "evidence" merely because it produced some evidence of paranoia, when the statute also requires proof of an adverse effect on the ability of practicing medicine, in itself constitutes the very type of arbitrary and irrational governmental action which due process forbids.[8]

To revoke the license of a medical doctor on the grounds that he is paranoid, without showing that the paranoia relates to the ability to care for patients, would be no different from revoking a medical license because the doctor has racial prejudice. This, like paranoia, is a form of disordered thinking in which certain beliefs are entertained without any relationship to reality. Yet, such disordered thinking has no relationship to the ability to treat patients safely.

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[7]The Medical Board did introduce one evidence of what it claimed to be improper medical treatment at the hearing. There was no evidence that this one incident of improper treatment has any relationship whatever to paranoia.

[8]That substantive due process requires that state action be less than "arbitrary and capricious" is firmly established. *Fundiller v. Cooper City*, 777F. 2d 1436 (11th Cir. 1985); *Regents of the Univ. of Michigan v. Ewing*, 474 U. S. 214, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985).

Those interested in literature are aware that the ingenious German writer, Fronz Kafka, author of *The Metamorphis*, suffered from severe mental illness, and died in a sanatorium, Had the Mississippi Medical Licensure Board the authority to license writers, society would have been deprived of Kafka's significant works. This simple illustration demonstrates the arbitrary nature of the Board's depriving Dr. Majd of his medical license, and is sufficient proof that this Court should right this great injustice by granting the Writ, and informing both the Fifth Circuit and the Mississippi Medical Licensure Board that some evidence, relevant to Majd's ability to practice safe medicine, is required as a condition to the suspension of a medical license.

Respectfully submitted,

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-4913

Summary Calendar

DR. EZZAT MAJD POUR,

Plaintiff-Appellant,

versus

MISSISSIPPI MEDICAL LICENSURE
BOARD OF THE STATE OF MISSISSIPPI, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the
Southern District of Mississippi
(CA-J87-0419 (L))
(July 24, 1990)

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:[1]

Dr. Majd appeals from a judgment dismissing his substantive due process claims against the Mississippi Medical Licensure Board. We affirm.

I

Dr. Majd was licensed to practice medicine in Mississippi in 1981. In 1985, Dr. Majd began practicing medicine in

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[1]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Tunica, Mississippi. In response to a complaint filed in 1986, and pursuant to statutory procedures,[2] Dr. Majd was referred to the Examining Committee of the Mississippi State Board of Medical Licensure ("the Board") to determine his fitness to practice medicine with reasonable skill and safety to patients.

Dr. Majd appeared before the Executive Committee on September 18, 1986. As requested by the Committee, Dr. Majd submitted to examinations by a psychiatrist and psychologist. The examiners concluded that Dr. Majd was suffering from a major thought disorder and paranoid state, and that he was incompetent, not responsible, and was in need of immediate medical treatment. In its final recommendation dated October 16, 1986, the Executive Committee found that Dr. Majd was in need of immediate medical treatment and that his continued practice of medicine constituted an imminent danger to public health and safety.

A hearing was conducted on March 19-20, 1987 before eight of the nine members of the Board. Dr. Majd was present with his attorney. The evidence showed that in 1974 Dr. Majd was diagnosed as suffering from depression and a mild schizoid personality with a final diagnosis of hyperthyroidism, postural hypotension, anxiety depressive reaction and situational stress reaction. There was evidence that Dr. Majd had accused the hospital staff of stealing and killing patients, and plotting to murder him. He had also accused a nurse of being a "prostitute" and "turning into a vampire at night." There was

[2]Miss code Ann. §§ 73-25-51 through 73-25-67 (1972).

also evidence that Dr. Majd carried a .38 caliber pistol and that he had frightened one of his staff with it. Other evidence showed that Dr. Majd had scheduled a mastectomy to be performed under local anesthesia, but the procedure was not performed after the matter came to the attention of a supervising physician. Two Board-certified psychiatrists testified that, in their opinion, Dr. Majd suffered from mental illness that affected his ability to practice medicine and could lead to danger in caring for patients.

Dr. Majd introduced evidence of independent evaluations by four psychiatrists, each of whom found that he was not suffering from any psychiatric disorder. The Board, however, found that the evaluations were based on incomplete background history and/or improper data. Dr. Majd also introduced evidence of an evaluation by a psychologist, Dr. Kallman, who described Dr. Majd's conduct as not indicative of "delusional" behavior, but merely "angry exaggerations." Dr. Kallman also found, however, that Dr. Majd might have suffered on one occasion from an "acute paranoid disorder."

The Board, by a 7-0 vote with one abstention, found that Dr. Majd had committed "unprofessional conduct," including "dishonorable or unethical conduct likely to deceive, defraud or harm the public," which is a ground for revocation or suspension of a physician's license pursuant to *Miss. Code Ann.* § 73-25-29(8)(d). By a 6-1 vote with one abstention, the Board also found, pursuant to *Miss. Code Ann.* § 73-25-53, that Dr. Majd was unable to practice medicine with reasonable skill and

safety to patients by reason of mental illness. The Board ordered that Dr. Majd's license be suspended for three years, but provided for a stay of the suspension if, within sixty days, Dr. Majd (1) obtained a physical examination by a Board-approved physician (2) obtained a psychiatric and psychological work-up with treatment and care by a Board-approved psychiatrist; and (3) provided the Board with monthly progress reports.

Dr. Majd then obtained independent evaluations from a physician, three psychiatrists, and two psychologists, all of whom found that Dr. Majd was not suffering from any psychiatric disorder. Some of the reports, however, were qualified as being based upon information provided by Dr. Majd, the accuracy of which had not been independently verified. After receiving these additional reports, the Board refused to reinstate Dr. Majd's license, stating that the physician and the psychiatrists had not been approved by the board prior to their examinations of Dr. Majd, and that the evaluations were not in compliance with other conditions specified in its earlier order. The Board gave Dr. Majd an additional sixty days to satisfy the conditions of its earlier order.

After Dr. Majd filed this lawsuit, the magistrate referred him to Dr. Thomasina Blissard for a psychiatric evaluation.[3] Dr. Blissard examined Dr. Majd on June 8, 1989, and con-

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[3]Dr. Majd was also evaluated by Dr. Maggio, a psychiatrist, on February 10, 1989. Dr. Maggio concluded that there was no evidence of psychosis and no psychiatric reason why Dr. Majd should not be allowed to practice medicine and surgery.

cluded that he was "without diagnosable mental illness or disorder and in good mental and emotional health." On June 28, 1989, Dr. Majd applied to the Board for reinstatement of his license. On July 20, 1989, the Board conducted a hearing on Dr. Majd's request. Dr. Blissard testified before the Board, and qualified her earlier report based upon materials and information given to her at the hearing which she had not seen previously. Dr. Blissard testified that she could not recommend reinstatement of Dr. Majd's license without the benefit of interviewing him over a period of weeks in different settings. The Board denied Dr. Majd's request for reinstatement. Upon the expiration of Dr. Majd's three-year suspension in March 1990, Dr. Majd's license became valid pursuant to *Miss. Code Ann.* § 73-25-27.

II

On July 23, 1987, Dr. Majd filed suit against the Board under 42 U. S. C. § 1983, seeking monetary damages. On October 7, 1988, Dr. Majd filed an amended complaint against the Board and its members seeking declaratory and injunctive relief. The Board moved to dismiss or, in the alternative, for summary judgment. The case was referred to a magistrate, who conducted a hearing on August 18, September 1, and September 15, 1989. The magistrate dismissed the action with prejudice, finding no due process violations. Dr. Majd appeals.

III

Dr. Majd contends that the Board's actions violated his "right to substantive due process"[4] for three reasons:

[4]See the discussion of substantive due process in *Brennan v. Stewart*, 834 F. 2d 1248, 1255-57 (5th Cir. 1988).

(1) the Board suspended his license without any substantial evidence that he was unable to practice medicine with reasonable skill or safety to patients by reason of mental illness; (2) the Board failed to adopt a "clear and convincing evidence" standard; and (3) the Board acted arbitrarily and capriciously.

A

Although Dr. Majd expressly disavows any reliance on procedural due process guarantees, Dr. Majd's argument on appeal challenges the quantum of evidence upon which the Board based its suspension of his license; the question he raises is therefore more accurately characterized as an issue of procedural, rather than "substantive," due process:

> Standards of proof, like other procedural due process rule(s), are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.

Santosky v. Kramer, 455 U. S. 745, 757 (1982) (quoting *Mathews v. Eldridge*, 424 U. S. 319, 344 (1976)). "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U. S. 418, 423 (1979).

Although the Supreme Court has held that a "clear and convincing evidence" standard of proof is required "when the individual interest at stake in a proceeding is of particular

importance and more substantial than mere loss of money," the Court has limited the application of that standard to proceedings involving termination of parental rights, involuntary commitment of the mentally ill, deportation of aliens, and denaturalization.[5] Although Dr. Majd contends that he has a liberty interest in practicing medicine and a property interest in his medical license, he does not contend that the Board's action interfered with any "fundamental" right. *See Neuwirth, D.D.S. v. Louisiana State Bd. of Dentistry*, 845 F. 2d 553, 558 (5th Cir. 1988) (license to practice dentistry is a non-fundamental right). The Supreme Court has not chosen to extend the "clear and convincing" standard of proof to state medical licensing board decisions, and we decline to do so in this case.

Regulation of the health care profession and restriction, suspension, or revocation of professional licenses is within the State's police power to protect the health, safety, and welfare of its citizens. As a matter of procedural due process, therefore, the Constitution requires only that the Board's decision to suspend Dr. Majd's license be supported by "some evidence" in the record. *See Superintendent, Massachusetts Correctional Institution v. Hill*, 472 U. S. 445, 454 (1985).

> Requiring a modicum of evidence to support a decision ...will help to prevent arbitrary deprivations without

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[5]*Santosky v. Kramer*, 445 U. S. 745 (1982) (parental rights); *Addington v. Texas*, 441 U. S. 418 (1979) (involuntary commitment of the mentally ill); *Woodby v. INS*, 385 U. S. 276 (1966) (deportation); *Chaunt v. United States*, 364 U. S. 350 (1960) (denaturalization); *Schneiderman v. United States*, 320 U. S. 118 (1943) (denaturalization).

> threatening institutional interests or imposing undue administrative burdens. In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence.

Id. at 455. The Court emphasized that the standard does not authorize a court to inquire into the sufficiency of the evidence to sustain a finding:

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.

Id. at 455-56.

Because the record in this case contains evidence to support the conclusions upon which the Board based its decision to suspend Dr. Majd's license, there is no due process violation. Even if the Board violated state law by evaluating the evidence against Dr. Majd with an incorrect standard of proof, such a violation of state law does not, of itself, violate substantive due process. *Stern v. Tarrant County Hosp.*, 778 F. 2d 1052 (5th Cir. 1985), *cert. denied*, 476 U. S. 1108 (1986).

B

Dr. Majd contends that the actions of the Board were arbitrary and capricious because, among other things, (1) the Board accepted the opinion of a single psychiatrist over the opinions of thirteen other psychiatrists and psychologists;

(2) the Board refused Dr. Majd's request for reinstatement even though Dr. Blissard had found him to be in "good mental health"; and (3) the Board suspended Dr. Majd's license for three years, arbitrarily deciding that the disease of "paranoia" would last for that period of time. In addition, Dr. Majd contends, rather vaguely, that the Board's actions are "the result of cultural or racial biases entertained against Dr. Majd because of his Iranian ancestry."

This court has previously emphasized its limited role in reviewing the decisions of state administrative agencies with respect to licenses of professionals. *See Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F. 2d 553 (5th Cir. 1988); *Ramirez v. Ahn*, 843 F. 2d 864 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 1545 (1989). As we have noted, the Supreme Court has said that is is not our function to determine whether the Board's decision was correct, or to second-guess the Board's evaluations. Our role is limited to determining whether the absence of evidence supporting the conclusion reached by the Board renders its actions arbitrary, capricious, or irrational. The record in this case demonstrates that there was a rational basis for the Board's actions. The psychiatrist and psychologist who first examined Dr. Majd concluded that he was suffering from a major thought disorder and paranoid state, and that he was incompetent, not responsible, and was in need of immediate medical treatment. The thirteen psychiatrists and psychologists who examined Dr. Majd and concluded that he suffered from no mental illness were not approved by the Board prior to conducting their examinations, and many of their reports were

qualified in that they were based solely on information furnished to them by Dr. Majd. Dr. Blissard, who initially concluded that Dr. Majd suffered from no mental health problems, later qualified her opinion based upon information that she had not seen prior to her initial report. Other evidence, including the evidence of Dr. Majd's 1974 illness, and the evidence of his accusations against the hospital staff, further support the Board's actions. We conclude, based upon our review of the record, that the Board's actions are the result of carefully considered professional judgments, which are supported by record evidence.[6]

Because the record contains evidence to support the Board's findings, we hold that its decision to suspend Dr. Majd's license was not arbitrary or capricious and thus did not violate the requirements of the fourteenth amendment.

IV

For the foregoing reasons, the judgment of the magistrate is

AFFIRMED.

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[6]Although Dr. Majd's brief focuses exclusively on the Board's finding that he was "unable to practice medicine with reasonable skill and safety to patients by reason of mental illness," we note that the Board's decision to suspend his license was also based upon its finding that Dr. Majd had engaged in "unprofessional conduct, including dishonorable or unethical conduct likely to deceive, defraud or harm the public," which is a ground for revocation or suspension of a physician's license pursuant to Miss. Code Ann. § 73-25-29(8)(d). Dr. Majd does not challenge that finding or the evidence in support of it.

I, Jim Waide, attorney for Petitioner, do hereby certify that I have this day mailed, postage prepaid, three (3) copies of the above and foregoing PETITION FOR WRIT OF CERTIORARI to the following:

Honorable Sara DeLoach
Assistant Attorney General
P. O. Box 220
Jackson, MS 39205

THIS the 12 day of OCT, 1990.

Jim Waide

JIM WAIDE